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In the

Supreme Court of the United States

October Term, 1963

No. 417

THE DIRECTOR OF THE DEPARTMENT OF WELFARE AND INSTITUTIONS, ET AL.,
Petitioners

v.

CHARLES F. YAEGER,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Supreme Court – State Library Building
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

The Director of the Department of Welfare and Institutions prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on June 29, 1963.

OPINIONS BELOW

The initial opinion of the District Court was filed on May 3, 1961, and is not reported (*Yaeger* v. *Director, et al*, Misc. No. 3277, U. S. Dist. Ct., E. D. Va.). It will be found in Appendix I.

The initial opinion of the court below was filed on January 3, 1962 (*Yaeger* v. *Director, et al.*, 298 F. 2d 55). It will be found in Appendix II.

The opinion of the District Court was filed on June 14, 1962, and is not reported (*Yaeger* v. *Director, et al.*, Misc. No. 3277, U. S. Dist. Ct., E. D. Va.). It will be found in Appendix III.

The opinion of the court below of June 29, 1963, is not yet reported (*Yaeger* v. *Director, et al.*, ... F. 2d .....). It will be found in Appendix IV.

THE JUDGMENT

On July 31, 1963, an order was entered in the United States Court of Appeals for the Fourth Circuit staying the issuance and transmission of a certified judgment in the premises. The order will be found printed as Appendix V to this petition for a writ of certiorari.

JURISDICTION

The Jurisdiction of this court to issue the writ of certiorari in the case at bar is grounded upon 28 U. S. C. Section 1254 (1).

QUESTION PRESENTED

Did the court err in declaring void sentences which the petitioner had to serve in the future and which he had not properly attacked in the State Courts.

STATUTES INVOLVED

Section 53-296 Code of Virginia (1950)
28 U. S. C. Section 1254 (1)
28 U. S. C. Section 2254

STATEMENT OF THE CASE

Charles F. Yaeger, hereinafter called the petitioner, was convicted of storebreaking in the Corporation Court of the City of Norfolk, Part II on August 8, 1944, and sentenced to serve a term of three years imprisonment. He was discharged on October 29, 1945.

The petitioner was convicted in the Corporation Court of the City of Norfolk on February 28, 1946, of storebreaking and larceny and sentenced to serve two years in the Virginia State Penitentiary. On June 19, 1946, while serving the aforesaid sentence, he was tried as a second-time offender pursuant to Section 53-296 of the Code of Virginia (1950) and sentenced to serve an additional year in the penitentiary. On April 2, 1947, petitioner was paroled.

On January 12, 1948, petitioner was convicted in the Corporation Court of the City of Norfolk, Part II of grand larceny and sentenced to serve four years in the Virginia State Penitentiary. Thereafter, while he was in the penitentiary, his parole was revoked by the parole board, and he had nine months and twenty-eight days (flat time) left to serve from his parole.

In June of 1950 he received an additional sentence of ten years in the penitentiary as a third-time offender.

On August 14, 1950, he was sentenced to serve one year in the penitentiary, having been convicted of escape. On March 23, 1953, petitioner was paroled.

On March 17, 1954, he was convicted in the Corporation Court of the City of Norfolk, Part II of attempted statutory burglary and sentenced to serve a term of five years in the Virginia State Penitentiary.

While confined in the penal system, his parole was revoked, and he had six years, four months, and twenty-four days (flat time) left to serve from parole.

On December 8, 1954, he was tried as a fourth-time offender in the Circuit Court of the City of Richmond and sentenced to serve an additional term of fifteen years in the Virginia State Penitentiary.

Petitioner filed a petition for writ of habeas corpus in the Supreme Court of Appeals of Virginia in which he attacked the validity of the ten year sentence imposed upon him as a third-time offender by the Circuit Court of the City of Richmond on June 14, 1950. The Supreme Court of Appeals of Virginia denied the writ on June 14, 1955, without an opinion. This Court denied certiorari (*Yaeger* v. *Director*, 350 U. S. 890).

At the time the aforesaid petition was filed, the petitioner was then serving his five-year sentence for attempted statutory burglary imposed upon him in the Corporation Court of the City of Norfolk, Part II on March 17, 1954.

The petitioner then filed a petition for a writ of habeas corpus in the District Court, which was denied without a hearing on May 3, 1961. On January 3, 1962, the United States Court of Appeals for the Fourth Circuit reversed the District Court and directed that a plenary hearing be held (*Yaeger* v. *Director*, 298 F. 2d 55). On April 23, 1962, a hearing in this case was held in the United States District Court for the Eastern District of Virginia at Richmond. On June 14, 1962, the District Judge filed his opinion and held that the petition should be dismissed. On September 5, 1962, an order was entered dismissing the petition.

At the time the hearing was held in the District Court the petitioner was then serving the sentence imposed upon him as a third time offender.

On June 29, 1963, the Court below rendered its opinion in the premises.

ARGUMENT

The Director will demonstrate on the following pages that the Court below has ignored established principles of law in reaching the decision in the case at bar. It will be shown that the court below has far exceeded its jurisdiction in the premises in considering matters not properly before it.

I.

The Court Erred in Declaring Void Sentences Which the Petitioner Had to Serve in the Future and Which He Had Not Properly Attacked in the State Courts.

This Court's attention is respectfully directed to the opinion of the court below in *Yaeger* v. *Director*, 295 F. 2d 55. The Court pointed out in that case that the crucial issue of fact which called for a determination was whether or not the petitioner had exhausted his "State remedies" (see, 28 U. S. C. Section 2254). Judge Sobeloff emphasized that if it should be found that the petitioner was serving the 1954 sentence for attempted burglary when he applied to the State Court for release, the petition would have to be dismissed for failure to exhaust State remedies.

A review of the District Court's opinion filed on June 14, 1962, reveals that the Court held that the petitioner was serving only the 1954 sentence for attempted burglary when he applied to the State Courts for release.

A review of the final opinion of the court below to which certiorari is being sought reveals that the court ignored its previous opinion and went off in several directions at once.

The Attorney General of Virginia contended throughout the hearing in the District Court that the petitioner had failed to exhaust his State remedies and that he was unable and was not prepared to defend any of the allegations set forth in the petition. Nevertheless, the court below held invalid an escape sentence of one year imposed upon the peti-

tioner. *It is noted that at the time the hearing was held in the habeas corpus proceeding in the District Court the petitioner was not then serving that sentence. It is further noted that the petitioner had not exhausted his "State remedies" as to that sentence.*

The Court below also invalidated a sentence imposed upon the petitioner as a fourth-time offender on December 8, 1954. *It is noted and emphasized that at the time of the hearing in the District Court the petitioner was not serving this sentence. It is of more importance to note that at the time of the argument and at the time of the decision of the court below in the case at bar, the petitioner was not then serving the sentence in question.*

The foregoing facts are undisputed in the record.

There are two cardinal principles of law applicable to habeas corpus proceedings, which for reasons unknown, were completely ignored by the court below. It not only ignored the decisions of this court, but the decisions of the Supreme Court of Appeals of Virginia and its own decisions.

It is well settled that a petitioner in a habeas corpus proceeding may only attack the validity of the sentence which serves as a basis for his present detention. See, *McDorman v. Smyth*, 187 Va. 522, 47 S. E. 2d 441; *Smyth v. Midgett*, 190 Va. 727, 101 S. E. 2d 575; *Yaeger v. Director*, 208 F. 2d 55; *McNally v. Hill*, 293 U. S. 131; *Darr v. Burford*, 339 U. S. 200; *Helfin v. U. S.*, 358 U. S. 415; *Fay v. Noia*, 9 L. Ed. 2d 837.

As hereinbefore emphasized, the petitioner at the time he sought relief in the State Courts was serving the sentence imposed upon him in the Corporation Court of the City of Norfolk, Part II on March 17, 1954. This was the only sentence which he could attack at that time. We have also heretofore emphasized that at the time of the hearing in the

District Court below the petitioner was serving the ten year sentence for third conviction imposed upon him in the Circuit Court of the City of Richmond on June 14, 1950. It is noted that he was represented by counsel at the time he was tried as a third-time offender. He could, therefore, at the time of the plenary hearing in the District Court attack only the validity of this sentence. He had, however, failed to exhaust his "State remedies" as to the sentence in question.

It is also well settled that a prisoner must exhaust the remedies available to him in the State courts before applying to the Federal courts for a writ of habeas corpus. See, *Tickle* v. *Summers*, 270 F. 2d 848; *Myers* v. *Blalock*, 271 F. 2d 424; *Morrison* v. *Smyth*, 273 F. 2d 544; *Fay* v. *Noia*, 9 L. Ed. 2d 837; (28 U. S. C. Section 2254).

In its final opinion, the court below ignored its previous opinion and, for reasons unknown, determined the validity of sentences which the petitioner had not attacked in the State Courts and which he could not attack in the State Courts in 1955, for the reason that he was not serving the same. The Court also invalidated a sentence which was to be served in the future (the recidivist sentence) and invalidated the escape sentence, which the petitioner was not serving at the time of the plenary hearing in the District Court.

On the same day that this case was argued in the court below, another case styled *Tune* v. *Cunningham* was heard. This case was decided on July 9, 1963 (*Tune* v. *Cunningham*, No. 8924 U. S. Court of Appeals for the Fourth Circuit ..... F. 2d .....). In the cited case the petitioner had contended throughout his State Court proceedings that he had not been represented by counsel at his trial in the Circuit Court of Bath County, Virginia, in 1938. The respondent produced court records which indicated conclusively that

two attorneys had been paid by the Commonwealth for representing Tune. The respondent also produced these two attorneys, who testified that they had represented Tune in the 1938 trial. The petitioner's attorney then argued that Tune had not been effectively represented by these two attorneys. The United States Court of Appeals for the Fourth Circuit in its decision in the cited case held that this latter issue had not been raised in the State Courts and that it was not properly before a Federal Court. The *Yaeger* case was argued first on June 7, 1963, and the argument in the *Tune* case immediately followed it. It is difficult, if not impossible, to comprehend why the court below emphasized the exhaustion of State remedies doctrine in the *Tune* case and completely ignored the same in this decision in the *Yaeger* case. This is of particular importance because of the Court's earlier decision on January 3, 1963, in the *Yaeger* case:

The court below has, therefore, not only ignored the decisions of this court in connection with the requirements of 28 U. S. C. Section 2254, but its own decision in a similar case argued on the same day.

It has been demonstrated that the court below ignored well-settled principles of law in considering the validity of sentences imposed upon a State prisoner when the State prisoner had failed to exhaust his State remedies as to the same and when the said prisoner was not serving the sentences in question. The Court, therefore, ignored two well-settled principles of law.

We do not believe and do not suggest that it is necessary for this Court to hear argument in the case at bar. Rather, we would respectfully recommend that the procedure followed by this Court in the case of *Johnson* v. *Virginia*, 10 L. Ed. 2d 195, be followed in the case at bar. It is respectfully urged that this Court grant the writ of certiorari and

in a per curiam opinion reverse the holding of the court below. This would obviate the necessity of further briefs and a full-scale argument in this case. We think it would be unnecessary for this Court to hear argument in a case of this sort.

CONCLUSION

The Director has demonstrated conclusively that the United States Court of Appeals for the Fourth Circuit ignored two cardinal principles of law applicable to habeas corpus proceedings. In the first instance the Court ignored its own opinion in this case rendered earlier and held in effect that a State prisoner need not exhaust the remedies available to him in the State Courts before applying to the Federal Courts for relief. The Court also ignored a long established principle of habeas corpus law that a prisoner may only attack the validity of his present detention.

It is for these reasons that we pray that this Court issue a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Fourth Circuit in the premises.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

RENO S. HARP, III
Assistant Attorney General

Supreme Court-State Library Building
Richmond 19, Virginia

PROOF OF SERVICE

I, Reno S. Harp, III, one of the attorneys for the petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on this the 28th day of August, 1963, I served copies of the foregoing Petition for a Writ of Certiorari on the respondent herein, Charles F. Yaeger, by mailing the same in a duly addressed envelope, with first class postage prepaid, to his attorney, James C. Roberts, Esquire, Attorney at Law, State-Planters Bank Building, Richmond, Virginia.

RENO S. HARP, III
Assistant Attorney General

APPENDIX I

OPINION OF THE DISTRICT COURT
(Filed May 3, 1961)

Upon consideration of the affidavit of Charles F. Yaeger, the petitioner herein, that because of his poverty he is unable to pay the costs or give security therefor; it is

ORDERED that said petitioner be allowed to commence and to prosecute this proceeding without being required to prepay fees or costs or to give security therefor.

The Court having been advised that Richard W. Copeland is no longer the Director of the Department of Welfare and Institutions of the State of Virginia and that William L. Painter is now serving as such; it is

ORDERED that William L. Painter be and he hereby is substituted in the place and stead of Richard W. Copeland as the party respondent herein, and all pleadings heretofore filed shall be treated as though William L. Painter, Director of the Department of Welfare and Institutions of the State of Virginia was named as the party respondent herein.

Upon consideration of the petition of Charles F. Yaeger, this day filed, praying that a writ of habeas corpus issue out of this Court directing that William L. Painter, Director of the Department of Welfare and Institutions of the State of Virginia, produce the body of said petitioner before the Judge of this Court, alleging that he is presently detained under authority of a sentence imposed under Section 53-296 of the Code of Virginia (1950), as amended, and that said sentence is null and void because the petitioner was denied his constitutional right to equal protection of the law in that the statute is applied in a discriminatory manner since only persons with prior convictions in Virginia courts are prosecuted thereunder;

It appearing to the Court that the constitutionality of

Section 53-296 of the Code of Virginia (1950), as amended, has not been fully determined in the state courts (Sims v. Smyth, 282 F. 2d 814 (4th Cir., 1960)) and it further appearing to the Court that petitioner raised this same issue in a petition for a three-judge court, filed in the United States District Court for the Eastern District of Virginia, Norfolk Division, which issue was duly considered in a memorandum opinion by Judge Walter E. Hoffman, filed with the order of Court dismissing the petition for a three-judge court, and the Court being of the opinion that the petitioner, Charles F. Yaeger, is not entitled to have a writ of habeas corpus issued; it is

ORDERED that the prayer of said petition for a writ of habeas corpus be and the same is hereby denied, and the said petition be and the same is hereby dismissed.

Let copies hereof be mailed by the Clerk to the petitioner, the respondent, and the Attorney General of Virginia.

.....
United States District Judge

Richmond, Virginia
May 3, 1961

APPENDIX II

OPINION OF THE COURT BELOW
(Filed January 3, 1962)

SOBELOFF, Chief Judge:

The United States District Court for the Eastern District of Virginia denied without a hearing Yaeger's petition for a writ of habeas corpus, filed pursuant to 28 U.S.C.A. § 2254. In substance, the petition attacks the administration of Virginia's recidivist statute. Va. Code Ann. § 53-296

(1958). The claim is that in practice the statute is applied to prisoners in respect to previous convictions in Virginia only, and not to convictions in other jurisdictions, thereby depriving him of the equal protection of the laws in violation of the Fourteenth Amendment. We, however, must remand the case to the District Court for findings as to whether the petitioner has exhausted his state remedies as is required by the statute before he may raise this constitutional claim in the federal courts.

The petitioner was first convicted in Virginia in 1944 for storebreaking and sentenced to one year's imprisonment which he served. Again arrested and convicted in February, 1946, for storebreaking and larceny, he was sentenced to a term of two years. In June, 1946, while serving the sentence on his second conviction, he was sentenced for one additional year as a recidivist, pursuant to Va. Code Ann. § 53-296 (1958). However, he was paroled in April, 1947. Petitioner's third conviction was in January, 1948, for grand larceny, for which he was sentenced to a term of four years. In June, 1950, he was sentenced to an additional ten years as a recidivist and, in August, 1950, still another year was added as punishment for an aborted escape from the state prison farm. He was paroled in 1953. Petitioner's fourth Virginia conviction was in March, 1954 for attempted statutory burglary, and he was given a five year sentence. He then still had over six years to serve under one or more of his prior sentences, namely, his 1948 grand larceny conviction, his 1950 conviction for recidivism, and his one year sentence for escaping prison. Later, in December, 1954, he was sentenced to fifteen more years for recidivism as a fourth offender.

Petitioner filed a petition for a writ of habeas corpus in the Supreme Court of Appeals of Virginia, but, on June 14, 1955, the writ was denied without opinion. The

Supreme Court of the United States declined review. *Yaeger v. Director*, 350 U. S. 880 (1955). When the present petition was filed in the federal court on March 14, 1961, the District Judge did not order the Attorney General of Virginia to show cause why the prisoner should not be released, nor was the Attorney General notified of the petition in any other manner. After the petition was denied without a hearing on May 3, 1961, the petitioner appealed.

The Attorney General of Virginia contends that the appeal must be dismissed because the petitioner has not exhausted the remedies in the state courts as required by 28 U.S.C.A. § 2254. He maintains that the constitutional issue, which the petitioner attempts to raise now in the federal courts, was not considered by the Supreme Court of Appeals of Virginia in 1955 when it denied the petitioner's writ of habeas corpus. This contention is predicated upon the asserted fact that, at the time of filing the writ in the state court, the petitioner was serving only the sentence imposed in March, 1954, for attempted burglary, and no other sentence, with the result that, under the Virginia law concerning applications for habeas corpus, the state court had no authority to consider the alleged unconstitutional administration of the recidivist statute since the recidivist sentence was not then being served. *McDorman v. Smyth*, 187 Va. 522, 47 S. E. 2d 441 (1948); see *Smyth v. Midgett*, 199 Va. 727, 101 S. E. 2d 575 (1958). To establish this asserted fact, the Attorney General relies upon two letters, written to the petitioner by W. R. Rice, a Records Officer at the Virginia State Penitentiary, and an affidavit of Curtis R. Mann, the Director of the Bureau of Records and Criminal Identification of the state penitentiary. In rebuttal, the petitioner insists that, by reason of his fourth conviction in 1954, his prior parole was revoked and that he thus resumed serving his 1950 sentence for recidivism.[1] The petitioner also argues that, if he was

serving the 1954 sentence for attempted burglary when he filed the writ of habeas corpus in the state court, he was serving concurrently his 1954 sentence for recidivism.

The documents relied on by the Commonwealth of Virginia are ambiguous in respect to which sentence or sentences Yaeger was serving when he filed his application in the Supreme Court of Appeals of Virginia. They indeed indicate that in 1955 he was serving his sentence for attempted burglary. They do not, however, establish that he was not also serving out the remainder of his 1950 ten year recidivist sentence on which he had been paroled and the parole revoked. Neither do these documents make it certain that he was not in 1955 also serving his 1954 fifteen year recidivist sentence. Moreover, the petitioner attacks the letters from W. R. Rice and the affidavit of Curtis R. Mann, as embodying conclusions which he maintains they were not authorized to make.[2]

There has thus been raised a crucial issue of fact, namely, the exact determination of the sentence or sentences which the petitioner was serving when he applied to the state court for release. If it should be found that he was serving only the 1954 sentence for attempted burglary, this petition would have to be dismissed for failure to exhaust state remedies. On the other hand, if he was serving the

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[1] The petitioner relies upon the provisions of Va. Code Ann. § 53-262 (1958), authorizing the Virginia Parole Board in its discretion to revoke a parole and order the prisoner to serve the remainder of his original sentence.

[2] The petitioner relies upon *Wright* v. *Youell*, 167 Va. 925, 168 S. E. 339 (1933), where the Commonwealth Attorney attempted to assert that an executive pardon, conditioned upon the prisoner's continued good behavior, was automatically revoked when the prisoner was convicted for a second time, and that service of the sentence on which he had been pardoned was resumed at the termination of the second sentence. The court said that ministerial officers had no authority to declare whether sentences are concurrent or consecutive. We do not here express approval or disapproval of the contention the petitioner bases upon this case.

1954 recidivist sentence concurrently with the sentence for the burglary and if under Virginia law the state court had authority to consider the merits of the constitutional claims, then the state remedies would be exhausted. It would then follow that the District Court would have to rule on the merits of petitioner's claim. If it should be found that the petitioner was serving the remainder of the earlier 1950 recidivist sentence and his present constitutional claim was presented to the state court, the novel question would be raised as to whether state remedies are exhausted when the petitioner, presently serving a different sentence, advances an identical constitutional issue. We need not engage in any further speculations, but shall await a definitive resolution of the crucial factual issue after an inquiry by the District Court. As we have said before, "It is not appropriate to make the initial tender of factual issues in the Court of Appeals." *Holly* v. *Smyth*, 280 F. 2d 536, 542 (4th Cir. 1960); see *Mayes* v. *Blalock*, 271 F. 2d 442, 444-45 (4th Cir., 1959).

Had our admonitions in *Shelton* v. *South Carolina*, 285 F. 2d 540 (4th Cir. 1961), been heeded, this appeal might have been easily avoided, saving this court, the Attorney General of Virginia, and the petitioner much time, expense, and frustration. In that opinion, we said that district judges should inform state attorneys of the filing by state prisoners of petitions for habeas corpus, either by means of a rule to show cause or some informal procedure, whenever the papers are not clear as to whether state remedies have been exhausted or whenever some other pertinent factual question is raised. Indeed, the Attorney General has emphasized that he wants very much to be informed about every petition for habeas corpus filed with the District Court, no matter how frivolous the issue presented might appear to be. It is very likely that in many cases attorneys for the state will be able to resolve conclusively

an unsettled issue of fact by filing relevant documents from the state records. These documents would become a part of the record of the case and would aid us in reviewing the disposition of the case by the District Court. By notifying the state, the prompt and orderly dispatch of these petitions will be promoted.

In *Shelton* v. *South Carolina*, *supra*, we also suggested that the district judge should indicate in a brief written opinion the reasons for dismissing a petition. We urge this course because it is possible that the judge has a good reason for his action which might not readily appear when review is sought or when a certificate of probable cause is requested unless it is specifically pointed out. Stating the reasons will often discourage fruitless appeals and applications for such certificates; and even if such appeals are taken and applications made, their proper disposition will be facilitated. In addition, when the judge accompanies his denial of a petition for habeas corpus with a statement of the supporting reasons, he avoids giving the petitioner an impression that justice is being administered arbitrarily.

We remand the case for a determination as to whether petitioner has exhausted his state remedies. In this instance, the District Court may, if it is deemed desirable, retain the case on the docket until the Supreme Court of Appeals of Virginia decides the case of *Sims* v. *Smyth* which involves the very issues raised by Yaeger. We retained Sims' appeal from the District Court pending determination of the constitutional issue by the state courts. 282 F. 2d 814 (4th Cir. 1960). We have been informed that *Sims* v. *Smyth* is on the January docket of the Supreme Court of Appeals of Virginia.

Reversed and remanded.

APPENDIX III

OPINION OF THE DISTRICT COURT

(Filed June 14, 1962)

Under date of May 3, 1961, this Court denied without a hearing Yaeger's petition for a writ of habeas corpus, attacking the administration of the Virginia Recidivist Statute upon the ground that the constitutionality of Section 53-296 of the Code of Virginia had not been fully determined in the state court.

The United States Court of Appeals for the Fourth Circuit remanded the case for a determination as to whether the petitioner had exhausted his state remedies.

Pursuant thereto, petitioner was granted a hearing with court-appointed counsel and the matter was heard upon the petition, the respondent's answer, the testimony of the petitioner and the Director of the Bureau of Records of the State Penitentiary and their respective exhibits, and upon argument of counsel.

Under date of April 5, 1962, the petitioner filed an additional pleading purporting to amend and amplify his original petition.

The petitioner claims he has exhausted his state remedies and is now entitled to a ruling on the merits by the Federal Court. The State says Yaeger was serving a 5-year sentence imposed by the Corporation Court, Part 2, of the City of Norfolk when he filed his petitions for writ of habeas corpus in the state courts[1] and that his efforts were premature in attacking the validity of his recidivist sentences.

Thus it is necessary to determine the sentence or sentences the petitioner was serving when he applied to the state court for his release.

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[1] Filed in the City of Norfolk December 2, 1954; Filed in the Supreme Court of Appeals of Virginia June 14, 1955.

Section 53-24 of the Code of Virginia provides that the Director shall file and preserve a copy of the judgment furnished by the Clerk of the Court of the conviction of each convict and keep a register describing the term of his confinement, for what offense and when received into the penitentiary. Stuart J. Melton, Director of the Bureau of Records of the Virginia State Penitentiary, produced in this Court the records thus kept, pertaining to the petitioner.

These records show that Yaeger was placed on parole March 23, 1953, at which time he had left to serve on his previous convictions 6 years, 4 months and 24 days, of which 5 years, 8 months and 24 days remained from the 10-year (3rd-conviction recidivist) sentence imposed June 14, 1950, and 8 months remaining from a 1-year escape sentence imposed August 14, 1950.

On April 1, 1954, Yaeger was committed to the Virginia State Penitentiary pursuant to the judgment of the Corporation Court, Part 2, of the City of Norfolk, wherein he was sentenced to serve 5 years for attempted statutory burglary. Deducting time spent in jail awaiting trial (Section 53-208 of the Code of Virginia) and for good-conduct credit (ca. 3d (pursuant to Section 53-213 of the Code of Virginia), this sentence expired May 7, 1957.

Prior to April 1, 1954, Yaeger was arrested on a warrant charging violation of parole (Section 53-258 of the Code of Virginia).

On December 8, 1954, Yaeger was convicted in the Circuit Court of the City of Richmond as a four-time recidivist and sentenced to 15 years in the penitentiary.

If Yaeger's remaining time automatically began to run from the date of his arrest as a parole violator, he would have been serving the remainder of his three-time recidivist sentence when he applied for his release through the state

courts in 1955. If, not, he would have been serving the 5-year sentence imposed for attempted statutory burglary, unless he was serving this sentence concurrently with the remaining portion of his 1950 recidivist sentence.

Section 19.1-294 of the Code of Virginia provides: "When any person is convicted of two or more offenses, and sentenced to confinement, such sentences shall not run concurrently, unless expressly ordered by the court."

The Parole Board revoked Yaeger's parole April 9, 1954, and ordered the reincarceration of the prisoner for the unserved portion of the term of imprisonment originally imposed upon him (pursuant to Section 53-262 of the Code of Virginia). There was no court order providing that this sentence be served concurrently with the 5-year attempted statutory burglary sentence imposed by the Corporation Court of the City of Norfolk. Likewise, there was no court order directing that the 1954 recidivist sentence be served concurrently with either or both of the foregoing sentences. Each sentence constituted a separate conviction. In such cases confinement commences after previous term expires. See Section 19.1-294 and Hudson v. Youell, Supt. of Penitentiary, 19 S. E. 2d 705.

From these facts this Court finds Yaeger was serving the attempted statutory burglary sentence in 1955 when he applied to the Supreme Court of Appeals of Virginia for his release; that he began to serve the remainder of his 1950 recidivist sentence May 7, 1957; that he will begin to serve the escape sentence January 31, 1963; and that he will begin to serve his 1954 recidivist sentence September 30, 1963.

Therefore, in accordance with the holding of the Fourth Circuit in Yaeger v. Director of the Department of Welfare and Institutions, et al., 298 F. 2d 55 (4 Cir., 1962), this case should be dismissed on the ground that the petitioner's

efforts in 1955 were premature in attacking in the Supreme Court of Appeals of Virginia the validity of his recidivist sentence.

However, that Court (Fourth Circuit) stated that this Court may retain, if it is deemed desirable, this case on the docket until the Supreme Court of Appeals of Virginia decides the case of Sims v. Smyth, which involves the very issues[1] raised by Yaeger.

Yaeger, by preferred amendment to his original petition in this Court, further contends that he was denied counsel in all of his recidivist convictions and in his escape conviction. He further attacks the validity of his 1948 and 1954 convictions in the Corporation Court, Part 2, of the City of Norfolk.

The Supreme Court of Appeals of Virginia in Sims v. Cunningham, Jr., Supt., etc., 124 S. E. 2d 221, held "that Code Section 53-296, is constitutional, and that it is not administered in such a manner as to deprive petitioner of equal protection of the laws guaranteed to him either by the Constitution of the United States or the Constitution of Virginia."

Application has been made to reinstate Sims v. Smyth, 282 F. 2d 814, upon the docket of the United States Court of Appeals for the Fourth Circuit.

The case of Chewning v. Cunningham, Jr., Penitentiary Supt., 368 U. S. 443, held that a charge of being an habitual criminal is such a serious one, the issues presented under the Virginia Statute are so complex, and the potential prejudice resulting from the absence of counsel is so great that petitioner's trial and conviction without counsel violated the Due Process Clause of the 14th Amendment.

[1] Whether Section 53-296 of the Code of Virginia (Recidivist Statute) violates the 14th Amendment of the United States Constitution if it is being applied only to cases of prior Virginia convictions.

In accordance therewith, the State has notified all recidivist prisoners that their sentences will be vacated and they will be given a new trial. These cases, which are quite numerous, are expected to be heard in the Circuit Court of the City of Richmond during the months of June and July of this year.

In view of the foregoing decisions of the Supreme Court of the United States and the Supreme Court of Appeals of Virginia, it would be unjust to require the petitioner to reassert these same issues in the State Courts before this Court will entertain his position for a writ of habeas corpus.

Having thus retained jurisdiction, this Court finds that the petitioner, Charles F. Yaeger, did not waive counsel and that none was appointed for him by the Court when he was tried and convicted of the charge of escape in the Circuit Court of Goochland County, Virginia, August 14, 1950.

The Court further finds, under the circumstances in that case and taking into consideration the experience and age of the petitioner and the nature of the charge, the failure of said Court to appoint counsel was not a denial of due process of law. The State is not required to appoint counsel for indigent defendants in all criminal cases. See Betts v. Brady, 316 U. S. 455.

The Court further finds that court-appointed counsel was furnished Yaeger by the Circuit Court of the City of Richmond when he was tried and convicted as a three-time recidivist June 14, 1950 (see petitioner's Exhibit A attached to his original petition). Yaeger's charge that his court-appointed counsel was incompetent is not supported by the evidence.

The Court further finds that Yaeger did not waive counsel and none was appointed for him by the Court when he was tried and convicted as a four-time recidivist in the

Circuit Court of the City of Richmond December 8, 1954, and for that reason Charles F. Yaeger was denied due process of law and that conviction will be set aside. Chewning v. Cunningham, Jr., Penitentiary Superintendent, supra.

The remaining grounds for immediate release have been passed upon by the Virginia State Courts and found insufficient. This Court also finds those charges[1] are not supported by the evidence.

This Court having found that Charles F. Yaeger is now serving the remaining portion of his 1950 recidivist sentence and that his escape sentence is yet to be served, and that both of said sentences are lawful, he shall remain in the custody of the respondent until said sentences have expired in accordance with the law, at which time he shall stand discharged and released, unless prior thereto he is charged, retried and convicted in the Virginia State Courts as a four time recidivist.

Counsel for the petitioner will prepare an appropriate order in accordance with this memorandum opinion, submit it to counsel for the respondent for approval as to form and, it will be entered accordingly.

Let copies of this memorandum opinion be sent forthwith to the petitioner, his court-appointed counsel, James C. Roberts, Esquire, and the Attorney General of the Commonwealth of Virginia.

(S) Oren R. Lewis
United States District Judge

Alexandria, Virginia
June 14, 1962

[1] Incidents of trials and convictions in Corporation Court, Part 2, of the City of Norfolk.

APPENDIX IV

OPINION OF THE COURT BELOW
(Filed June 29, 1963)

SOBELOFF, Chief Judge:

On the earlier appeal of this case we remanded to the District Court for a hearing. After a hearing held on June 14, 1962, the District Court found that the appellant had been denied the assistance of counsel in his trial in August, 1950, in the state court on the charge of escape from prison. However, applying the rule of *Betts* v. *Brady*, 316 U. S. 455 (1942), which the Supreme Court has since repudiated, the District Court held that such denial had not operated to deprive the appellant of any constitutional rights. The sentence for escape is the one currently being served by the appellant. It is clear that under *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), the conviction and sentence are invalid and constitute no legal cause for the detention of the appellant.

The District Court also found that a fifteen-year recidivist sentence imposed on the appellant in 1954 as a fourth-time offender was void for the reason that in that proceeding too the appellant had been denied the assistance of counsel. This holding of the District Court is clearly correct under the authority of *Chewning* v. *Cunningham*, 368 U. S. 443 (1962), which held that a recidivist proceeding is of sufficient gravity to entitle the defendant to counsel, and that denial of counsel in such a proceeding violates the prisoner's constitutional rights under the Fourteenth Amendment.

Although the sentences are void, it does not follow that the prisoner is entitled to release, for normally upon the invalidation of proceedings an appellant would be subject

to retrial in the state court.[1] This is clearly so as to the escape sentence, but in this case the practical importance of the rule is reduced by the fact that the escape sentence will have been served out by September, 1963.

As to the recidivist proceeding, the Attorney General stated to the court that arrangements have been made to retry the appellant in July, a few weeks from this date. Service of any new sentence for recidivism would begin at the expiration of the sentence for escape.

The court-appointed counsel for the appellant has argued to us that the Commonwealth of Virginia may not now retry Yaeger as a fourth-time recidivist, contending that the appellant has completed service of the last of the four substantive sentences which constitute the basis for the recidivist proceeding.[2] The appellant's theory, which finds at least a measure of support in *Reynolds* v. *Cochran*, 365 U. S. 525, 526 n.2 (1961),[3] is that punishment imposed on a recidivist is not for an independent offense but is in the nature of an enhancement of the punishment for a substantive offense. Consequently, it is argued that if the prisoner has served out the penalties imposed upon him for all of his substantive offenses, he may not then be subjected to an additional penalty, for to do so would violate the prohibition against double jeopardy.

The question raised may have substance, but it has never been presented to the state courts of Virginia. As it

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[1] This the Commonwealth of Virginia has now recognized and is scheduling trial of all recidivists who were tried without the benefit of counsel.

[2] The petitioner's fourth Virginia conviction was in March, 1954, for statutory burglary and the sentence imposed for that offense was a prison term of five years, which according to the District Court's finding was completed on May 6, 1957.

[3] And see *Chewning* v. *Cunningham*, 368 U. S. 443, 447 (1962).

involves the interpretation and operation of a statute of that state, we deem it appropriate to refrain from initially deciding the point. The objection to the authority of the state to retry Yaeger at this time as a fourth-time recidivist is one of the defenses that may appropriately be addressed to the state court in July. In so declaring, we think it proper to observe that it would not be fair to the appellant to postpone the retrial in the state court indefinitely, in view of the earlier proceedings for release on habeas corpus which have been running their course for some years, and especially in light of the fact that last March the case was postponed till July over the appellant's objection.

Therefore, the District Court's order insofar as it invalidated the recidivist sentence is affirmed; insofar as it upheld the sentence for escape it is reversed; and the case is remanded to the District Court pending the indicated retrial of the recidivist proceeding in the state court.

Affirmed in part, reversed in part, and remanded.

APPENDIX V

ORDER OF THE UNITED STATES COURT OF APPEALS

(Filed July 31, 1963)

Upon the petition of the appellees, by their counsel and for cause shown,

It is ordered that the issuance and transmission of a certified copy of the judgment of this court in lieu of a Mandate be, and it is hereby, stayed pending application

of the appellees in the Supreme Court of the United States for a writ of certiorari to this court, provided the application for a writ of certiorari is filed in the Supreme Court within the time provided by law.

July 31, 1963.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.